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1992]

CRIMINAL LAW—GOVERNMENT CONDUCT THAT BREACHES A PLEA
AGREEMENT IN THE THIRD CIRCUIT

United States v. Hayes (1991)

I. INTRODUCTION

In a majority of criminal cases, defendants negotiate a plea of guilty to one or more charges in exchange for some promise from the government.¹ A plea negotiation may consist of “charge bargaining” or “sentence bargaining.”² Charge bargaining involves a defendant pleading guilty to a charge lesser than the one originally brought by the government.³ In sentence bargaining, the defendant’s plea of guilty to the original charge is made in exchange for the government’s promise regarding the sentence to be imposed.⁴ The government may promise to seek leniency, probation, a specific sentence, or simply to “refrain from making any recommendation to the judge.”⁵

1. 2 WAYNE R. LAFAYE & JERALD H. ISRAEL, CRIMINAL PROCEDURE § 20.1, at 554 (1984). When negotiating a plea agreement with the federal government, the process is governed by Rule 11 of the Federal Rules of Criminal Procedure. Rule 11(e) states in part:

The Attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney, for the government will do any of the following:

- (A) move for dismissal of other charges; or
- (B) make a recommendation, or agree not to oppose the defendant’s request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

Fed. R. Crim. P. 11(e)(1). For a comprehensive source of cases discussing plea agreements, see Project, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1990-1991*, 80 Geo. L.J. 939, 1261-83 (1992). For an analysis of the process of plea bargaining under contractual theory and a discussion of the arguments for and against plea bargaining, see Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

2. 2 LAFAYE & ISRAEL, *supra* note 1, at 554-55.

3. 2 *id.* at 554. A defendant’s incentive to plead guilty to a less serious charge may be to receive a lower statutory maximum penalty for the offense or to avoid the initial charge from appearing on his or her record of conviction. 2 *id.* at 554-55.

4. 2 *id.* at 555.

5. 2 *id.*

(1014)

The United States Supreme Court in *Santobello v. New York*⁶ recognized that plea negotiation was “an essential component of the administration of justice.”⁷ The Court emphasized that the government must fulfill its promise to a defendant when that promise induces a defendant to plead guilty.⁸

The issue of whether the government breached its plea agreement with a criminal defendant has been addressed by the Third Circuit on several occasions.⁹ Recently, the Third Circuit refined its notion of what constitutes a governmental breach of a plea agreement in *United States v. Hayes*.¹⁰ Using a previous Third Circuit decision, *United States v. Moscahlaidis*,¹¹ as a guide to analyzing a plea agreement, the court in *Hayes* reiterated the three different standards of review that govern the interpretation of a plea agreement.¹² First, the district court’s factual findings are to be reviewed under a clearly erroneous standard.¹³ Second, the appellate court has plenary review when the issue is whether the government’s conduct amounted to a breach.¹⁴ Third, once a breach has been shown, the case must be remanded to the district court for either resentencing or withdrawal of the guilty plea.¹⁵

In *Hayes*, the issue on appeal addressed whether the government’s conduct at sentencing violated a plea agreement between the two par-

6. 404 U.S. 257 (1971).

7. *Id.* at 260.

8. *Id.* at 262. The Court in *Santobello* found that the government had breached its plea agreement because the government failed to keep its promise concerning the sentence recommendation on the defendant’s guilty plea. For a discussion of the facts of *Santobello*, see *infra* note 56.

9. See, e.g., *United States v. Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989); *United States v. Miller*, 565 F.2d 1273 (3d Cir. 1977), *cert. denied*, 436 U.S. 959 (1978); *United States v. Crusco*, 536 F.2d 21 (3d Cir. 1976).

10. 946 F.2d 230 (3d Cir. 1991).

11. 868 F.2d 1357 (3d Cir. 1989). The *Hayes* court adopted the *Moscahlaidis* decision’s framework in analyzing plea agreements. *Hayes*, 946 F.2d at 233.

12. *Hayes*, 946 F.2d at 233 (quoting *Moscahlaidis*, 868 F.2d at 1360).

13. *Id.* (quoting *Moscahlaidis*, 868 F.2d at 1360). The Third Circuit in *Moscahlaidis* stated that disputed facts that had been determined by the district court were reviewed under a clearly erroneous standard by a reviewing court. *Id.* (quoting *Moscahlaidis*, 868 F.2d at 1360).

14. *Id.* (quoting *Moscahlaidis*, 868 F.2d at 1360). The *Hayes* court quoted the *Moscahlaidis* court’s statement that “[w]hether the government’s conduct violates the terms of the plea agreement is a question of law and our review is plenary.” *Id.* (quoting *Moscahlaidis*, 868 F.2d at 1360); see also *United States v. Miller*, 565 F.2d 1273 (3d Cir. 1977), *cert. denied*, 436 U.S. 959 (1978); *United States v. Crusco*, 53 F.2d 21 (3d Cir. 1976).

15. *Hayes*, 946 F.2d at 233 (quoting *Moscahlaidis*, 868 F.2d at 1360). The *Moscahlaidis* court cited the United States Supreme Court’s conclusion in *Santobello v. New York*, 404 U.S. 257 (1971), that remand is the remedy available in such a situation. *Hayes*, 946 F.2d at 233 (quoting *Moscahlaidis*, 868 F.2d at 1360).

ties.¹⁶ The Third Circuit, therefore, had plenary review.¹⁷ The *Hayes* court discussed the specific language of the plea agreement and the alleged conduct of the government.¹⁸ While the court employed the same comparison measures it had used in prior decisions, focusing on the language in the plea agreement and the government's conduct, the court applied these measures to a new factual context.¹⁹ The *Hayes* court distinguished its case from the only factually similar circuit decision, *United States v. Brummett*,²⁰ a Sixth Circuit opinion, and held that the government had breached the plea agreement.²¹

II. CASE ANALYSIS

A. *Facts and Procedural History*

In *Hayes*, the appellant, David S. Hayes, sought to appeal his criminal sentence contending that the government breached its plea agreement under which the government agreed not to recommend a specific sentence.²² Hayes entered guilty pleas on December 3, 1990 to four

16. *Hayes*, 946 F.2d at 233 n.2. The *Hayes* court stated in a footnote that the factual findings were undisputed but that the issue on appeal was whether the government's conduct violated the terms of the plea agreement. *Id.* The court, therefore, evaluated whether the government had satisfied its commitment to Hayes. *Id.* at 233.

17. *See id.* The court quoted the *Moscahlaidis* opinion for the proposition that plenary review is the standard for determining whether government conduct violated the plea agreement. *Id.* (quoting *Moscahlaidis*, 868 F.2d at 1360).

18. *See id.* at 235.

19. *Id.* The Third Circuit noted that the factual situation in *Hayes* was different from the factual situations discussed in the court's previous cases. *Id.* For a discussion of the cases reviewed by the court, see *infra* notes 64-103 and accompanying text.

20. 786 F.2d 720 (6th Cir. 1986).

21. *Hayes*, 946 F.2d at 235 n.5. For a discussion of the Sixth Circuit's opinion in *United States v. Brummett*, see *infra* notes 104-17 and accompanying text.

22. *Hayes*, 946 F.2d at 231. The Third Circuit stated Hayes' first challenge as follows: "(1) in its Sentencing Memorandum, as well as in oral statements during the sentencing, the government breached that portion of the plea agreement in which it agreed not to recommend a specific sentence[.]" *Id.* Hayes also challenged the validity of his sentencing based on several other contentions.

Id. The court listed Hayes' remaining challenges as:

(2) the district court erred in its application of Sections 2G.1.1 and 2G.1.2 of the Sentencing Guidelines; (3) the failure of the district court to consider [Hayes'] diminished capacity as a mitigating factor in determining the applicable Sentencing Guidelines was clearly erroneous; (4) no factual basis existed in the record to support his guilty pleas to Counts One and Two [involving the transportation of a minor in interstate commerce for the purpose of prostitution]; and (5) the forfeiture of the property located in Fairview, Pennsylvania, was improper because [Hayes] did not own the property at the time the offenses occurred.

Id. The Third Circuit did not address these issues because it remanded the case after finding a breach of the plea agreement. *Id.*

counts of an indictment charging him with illegal activity.²³ Hayes had invited individuals, at least one of whom was a minor, to his Pennsylvania residence for parties that involved illicit drugs and prohibited sexual activity.²⁴ Under Count One, Hayes was charged with conspiracy to cause persons to travel in interstate commerce for purposes of criminally sanctioned sexual activity.²⁵ Only this count was subject to the United States Sentencing Guidelines (Sentencing Guidelines).²⁶ Hayes' guilty plea resulted in a sentence of fifty-four months of imprison-

23. *Id.* Hayes entered his pleas in the United States District Court for the Western District of Pennsylvania to the following counts:

Count One charged [Hayes] with conspiracy to cause persons to travel in interstate commerce for purposes of criminally sanctioned sexual activity in violation of 18 U.S.C. § 371, Count Two with knowingly transporting an individual under the age of 18 in interstate commerce for the purpose of prostitution in violation of 18 U.S.C. § 2423, Count Three with knowingly and intentionally possessing with the intent to distribute less than 50 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1), and Count Six with knowingly and intentionally distributing controlled substances at [Hayes'] residence, thereby subjecting the real property to forfeiture to the United States pursuant to 21 U.S.C. § 853(a).

Id.

24. *Id.* at 232. Beginning in 1985, Hayes gave parties during which he provided illicit drugs and encouraged his visitors, who came from Ohio and Pennsylvania, to engage in sexual acts with himself and others, sometimes in exchange for money. *Id.*

25. *Id.* at 231. For a description of the counts to which Hayes pled guilty, see *supra* note 23.

26. *Hayes*, 946 F.2d at 232 n.1. The Sentencing Guidelines were promulgated pursuant to the powers of the United States Sentencing Commission. 28 U.S.C. § 994(a)(1) (1988). The United States Sentencing Commission was established as an independent commission in the judicial branch of the United States, whose members are appointed by the President and approved by the Senate. *Id.* § 991(a). Following are the purposes of the United States Commission:

(1) [To] establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing procedures; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) [To] develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

Id. § 991(b).

The duties of the Commission in meeting its purposes involve promulgating

ment.²⁷ In its Sentencing Memorandum, the government advocated a sentence for Count One within the range of the Sentencing Guidelines.²⁸ On appeal, Hayes objected to the government's sentencing recommendation as breaching the plea agreement.²⁹

Hayes also challenged his sentencing under the other counts.³⁰ Although the Sentencing Guidelines did not apply to these counts, Hayes was sentenced to an additional consecutive term of thirty-six months and a concurrent term of twenty-four months.³¹ These counts had charged him with transporting a minor in interstate commerce for prostitution and possession of narcotics with intent to distribute.³² On

and distributing to all courts of the United States and to the United States Probation System:

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

....

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code

Id. § 994(a). As mentioned in the provisions of title 28 of the United States Code, the sentencing of defendants is determined according to guidelines that have been promulgated in accordance with the purposes set forth in 18 U.S.C. § 3553(a)(2). *Id.* § 991(b)(1)(a); 18 U.S.C. § 3551(a) (1988). Title 18 sets forth the need for the sentence imposed to reflect the following purposes:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

18 U.S.C. § 3553(a)(2).

The Third Circuit in *Hayes* noted that Count One, which involved a conspiracy spanning from 1985 to 1990, was the only count to which the Sentencing Guidelines would apply. *Hayes*, 946 F.2d at 232 n.1.

27. *Hayes*, 946 F.2d at 231. Count One is relevant to Hayes' allegation that the government breached its promise not to recommend a specific sentence. *See id.* at 232.

28. *See id.* The Third Circuit in *Hayes* referred to the "Government's Response to Defendant's Presentence Objections and Sentencing Memorandum" as the Government's Response. This case brief will refer to this document as the government's Sentencing Memorandum. *See id.*

29. *Id.*

30. *Id.* at 231.

31. *Id.*

32. *Id.* The 36-month term for Count Two was to run consecutively with Count One, while the 24-month term for Count Three was to run concurrently

appeal, Hayes objected to the government's conduct at sentencing, which advocated a lengthy period of incarceration for these nonguideline counts.³³

The plea agreement at issue stated that the United States Attorney agreed to "retain[] the right . . . to advise the sentencing Court of the full nature and extent of the involvement of [Hayes] in the offenses charged."³⁴ The United States Attorney further agreed to "make no recommendation as to the specific sentence."³⁵ Thus, the government allegedly breached this agreement when it included language in its Sentencing Memorandum which advocated "a sentence within the standard range of the guidelines as to Count One . . . and a lengthy period of incarceration on the nonguidelines counts."³⁶

Furthermore, at the sentencing hearing, the United States Attorney twice attempted to influence Hayes' sentencing.³⁷ The United States Attorney stated in his opening remarks that the seriousness of Hayes' offenses mandated lengthy incarceration.³⁸ He also advocated a lengthy term of incarceration based on the seriousness of Hayes' multiple activities and their impact on the community.³⁹

with Counts One and Two. *Id.* Hayes was also ordered to forfeit his residence and real property to the United States under Count Six. *Id.*

33. *Id.* at 232. The government thus based its sentencing recommendations on all of the counts to which Hayes pled guilty. *See id.*

34. *Id.* The full text of the relevant paragraph in the plea agreement to which the United States Attorney for the Western District of Pennsylvania and Hayes agreed states:

The United States Attorney retains the right of allocution at the time of sentencing to advise the sentencing Court of the full nature and extent of the involvement of [Hayes] in the offenses charged in the Indictment and of any other matters relevant to the imposition of a fair and just sentence.

Id.

35. *Id.* The plea agreement read: "The United States Attorney will make no recommendation as to the specific sentence that the Court should impose, but will provide the United States Probation Office and the District Court with any and all information pertaining to sentencing, including but not limited to all relevant conduct." *Id.*

36. *Id.* The full paragraph of the Sentencing Memorandum stated: [T]he government advocates a sentence within the standard range of the guidelines as to Count One (a range of 57 to 60 months incarceration) and a lengthy period of incarceration on the nonguidelines counts, along with whatever, psychological and/or psychiatric treatment the Court deems appropriate while [Hayes] undergoes that incarceration.

Id.

37. *Id.*

38. *Id.* The United States Attorney's opening comments emphasized to the district court that it was in the government's opinion that such a serious offense mandated lengthy incarceration. *Id.*

39. *Id.* at 232-33. The United States Attorney's conclusion stated the many factors that supported a lengthy incarceration for Hayes. *Id.* These factors included the seriousness of the offense, its occurrence over five years, its impact

B. *Analysis by the Third Circuit*

The *Hayes* court began its analysis of the alleged breach of the plea agreement by referring to a prior Third Circuit opinion, *United States v. Moscahlaidis*.⁴⁰ The Third Circuit in *Moscahlaidis* reiterated the three factors that determine the scope of appellate review.⁴¹ First, factual determinations are reviewed according to a clearly erroneous standard.⁴² Second, the court has plenary review of questions of law, such as whether government conduct amounted to a violation.⁴³ Finally, as mandated by the United States Supreme Court, if an appellant proves that the government breached a plea agreement, the case must be remanded for either resentencing or withdrawal of the appellant's guilty plea.⁴⁴

1. *Principles of Contract Law Applied to Plea Agreements*

The Third Circuit in *Hayes* first asserted that the government must abide by the plea agreement.⁴⁵ The court noted that the factual determinations of the terms of the plea agreement at issue and the government's conduct were undisputed.⁴⁶ The court focused its inquiry on whether the government's conduct violated the terms of the agree-

on the community, and the fact that there was no evidence indicating that Hayes had been rehabilitated. *Id.*

40. 868 F.2d 1357 (3d Cir. 1989). The Third Circuit in *Hayes* reaffirmed the framework for analyzing plea agreements that it developed in *Moscahlaidis*. *Hayes*, 946 F.2d at 233.

41. *Moscahlaidis*, 868 F.2d at 1360.

42. *Id.* (citing *United States v. Carrillo*, 709 F.2d 35 (9th Cir. 1983)). The Third Circuit in *Moscahlaidis* stated that the clearly erroneous standard limits its review of the disputed facts as determined by a district court. *Id.*

43. *Id.* (citing *United States v. Miller*, 565 F.2d 1273 (3d Cir. 1977), *cert. denied*, 436 U.S. 959 (1978) and *United States v. Crusco*, 536 F.2d 21 (3d Cir. 1977)).

44. *Id.* (citing *Santobello v. New York*, 404 U.S. 257 (1971)). In *Santobello*, the Supreme Court found that although a plea agreement had been breached by the government inadvertently, this circumstance did not lessen the impact of the breach. *Santobello*, 404 U.S. at 262. In discussing the relief available to the petitioner, whose case originated in the New York state court system, the Supreme Court stated that "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration." *Id.* at 262-63. The Court concluded that it was within the state court's discretion to determine what relief would be granted to the petitioner. *Id.* at 263. The Court believed that the state court was better equipped to evaluate the circumstances of the case. *Id.* The state court was in a better position to choose between granting specific performance of the plea agreement, which in this case required resentencing by a different judge, or allowing the petitioner to withdraw his guilty plea. *Id.*

45. *Hayes*, 946 F.2d at 233 (citing *Moscahlaidis*, 868 F.2d at 1361). The Third Circuit emphasized that the government must honor its bargain with Hayes. *Id.*

46. *Id.* at 233 n.2.

ment.⁴⁷ The court also stated that to determine whether the government honored its commitment to Hayes at sentencing, principles of contract law control.⁴⁸

Relying on the United States Supreme Court's seminal holding in *Santobello v. New York*,⁴⁹ the *Hayes* court stated that the government must fulfill its promise that served as part of the inducement or consideration for the plea agreement.⁵⁰ The Supreme Court in *Santobello* explained that a promise serves as an inducement or consideration when the defendant's agreement to enter the plea rests on the government's promise to a "significant degree."⁵¹ The government's duty to fulfill promises made during plea negotiations is so essential that even an inadvertent breach is not a defense.⁵² The *Hayes* court emphasized that a promise made by the government will receive close scrutiny.⁵³ The *Hayes* court stated that it should utilize such a high standard because a defendant risks the "surrender of certain constitutional rights including a meaningful restriction of his liberty" in the plea bargaining process.⁵⁴ Furthermore, the government may not assert harmless error because "due process and equity require that the sentence be vacated."⁵⁵

2. Government Promises in Plea Agreements

The *Hayes* court also reiterated the core holding by the Supreme Court in *Santobello* that "a prosecutor must keep a promise made in a plea agreement."⁵⁶ The *Hayes* court pointed out that subsequent to the

47. *Id.*

48. *Id.* at 233 & n.3. Previously, in *Moscahlaidis*, the Third Circuit had stated that "[a]lthough a plea agreement occurs in a criminal context, it remains contractual in nature and is to be analyzed under contract-law standards." *Moscahlaidis*, 868 F.2d at 1361.

49. 404 U.S. 257 (1971).

50. *Hayes*, 946 F.2d at 233 (citing *Santobello*, 404 U.S. at 262). The Supreme Court in *Santobello* stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 262. The Court stressed the need for this constant factor to serve as a procedural safeguard for a defendant during the Court's evaluation of a guilty plea. *Id.*

51. See *Santobello*, 404 U.S. at 262. The Court emphasized the agreement's dependence on the government's promise as an indication that the promise was an inducement. *Id.*

52. *Id.* at 262-63.

53. *Hayes*, 946 F.2d at 233.

54. *Id.* The Supreme Court in *Santobello* explained that a guilty plea is a serious occurrence because it results in a waiver of one's fundamental rights to a trial by jury, to confront an accuser, to call defense witnesses, to remain silent, and, finally, to be judged by a standard of proof of beyond all reasonable doubt. *Santobello*, 404 U.S. at 264 (Douglas, J., concurring).

55. *Santobello*, 404 U.S. at 262-63.

56. *Hayes*, 946 F.2d at 233-34. In *Santobello*, facing two felony gambling counts, the defendant had entered into a plea agreement with one prosecutor, pleading to a lesser-included gambling offense in exchange for the prosecutor's

Supreme Court's decision in *Santobello*, the Third Circuit had previously addressed the issue of governmental promises in plea agreements in several contexts.⁵⁷ The *Hayes* court discussed three of these decisions, *United States v. Crusco*,⁵⁸ *United States v. Miller*⁵⁹ and *United States v. Moscahlaidis*,⁶⁰ as illustrations of the Third Circuit's analysis of alleged plea agreement violations. The *Hayes* court then distinguished the factually similar case, *United States v. Brummett*.⁶¹ Next, the *Hayes* court analogized its case to *Miller* and *Santobello*.⁶² Finally, the court discussed the applicable remedy.⁶³

a. *United States v. Crusco*

In *Crusco*, the defendant, Phillip Cimmino, agreed to enter a guilty plea in exchange for a maximum sentence of seven years, and a promise by the government "not to take a position on sentencing."⁶⁴ The al-

promise to make no sentencing recommendation. *Santobello*, 404 U.S. at 258. Following several delays, the sentencing hearing finally took place before a different judge and with a new prosecutor replacing the prosecutor who had negotiated the plea. *Id.* at 258-59. The new prosecutor, apparently ignorant of the preceding commitment, recommended the maximum one-year sentence, citing the defendant's criminal record and alleged links with organized crime. *Id.* at 259. Dismissing the defense counsel's request for an adjournment in order to prepare proof of the first prosecutor's promise, the sentencing judge referred to the defendant's presentence report, stating that the prosecutor's recommendation "doesn't make a particle of difference." *Id.* The defendant's long and serious criminal record mandated institutionalization as the only way to stop his anti-social behavior. *Id.* at 260. The Supreme Court began its analysis by noting that the lapse in orderly prosecutorial procedures that occurred was inexcusable, despite the prosecutors' heavy workload. *Id.* The Court stressed that plea bargaining is an essential component of the justice system and should be encouraged when done properly. *Id.* The Court further emphasized that the defendant had "bargained" for a lesser charge, but on the condition that no sentence be recommended by the prosecutor. *Id.* at 262. Because the prosecutor conceded that the promise to refrain from a recommendation had been made, the Court stated that the prosecution was not in a position to argue that its inadvertent breach of the plea agreement was immaterial. *Id.* The Court concluded that the inadvertence of the breach did not lessen its impact on the defendant. *Id.*

57. *Hayes*, 946 F.2d at 233-34.

58. 536 F.2d 21 (3d Cir. 1976). For a discussion of *Crusco*, see *infra* notes 64-78 and accompanying text.

59. 565 F.2d 1273 (3d Cir. 1977), *cert. denied*, 436 U.S. 959 (1978). For a discussion of *Miller*, see *infra* notes 79-98 and accompanying text.

60. 868 F.2d 1357 (3d Cir. 1989). For a discussion of *Moscahlaidis*, see *infra* notes 99-103 and accompanying text.

61. *Hayes*, 946 F.2d at 235 n.5 (discussing *United States v. Brummett*, 786 F.2d 720 (6th Cir. 1986)).

62. *Id.* at 235. For a discussion of the reasoning in *Hayes*, see *infra* notes 118-33 and accompanying text.

63. *Id.* at 236. For a discussion of the remedy given to the defendant in *Hayes*, see *infra* notes 134-37 and accompanying text.

64. *United States v. Crusco*, 536 F.2d 21, 23 (3d Cir. 1976). Cimmino initially pled not guilty to one count of conspiracy to distribute and possess with

leged government misconduct was an attack on Cimmino's character made at the sentencing hearing.⁶⁵ Cimmino's attorney had pleaded for leniency, referring to the needs of Cimmino's family and the belief that "by no stretch of the imagination is [Cimmino] a heavy weight or person in a position to deal in large quantities of drugs, although that seems to be the allegation by the members of the . . . United States Attorney's office."⁶⁶ The government responded by noting that Cimmino had sold a half-kilogram of almost pure heroin as a sample to an undercover agent.⁶⁷ The government stated that this demonstrated Cimmino's important ties to organized crime and his danger to the community.⁶⁸

The government asserted three separate grounds to justify the language used at sentencing.⁶⁹ The Third Circuit, in *Crusco*, rejected each

intent to distribute certain controlled substances, and a second count of possession with intent to distribute and distribution of heroin. *Id.* Following several years of pre-trial proceedings, he ultimately pled guilty to the second count in exchange for a maximum sentence of seven years and the prosecution's promise to "take no position on sentencing." *Id.* Cimmino was sentenced to six years' imprisonment and an additional three years' special parole. *Id.* Upon sentencing, he sought to withdraw his guilty plea, arguing that he had been misled as to the maximum possible sentence and that the government had breached its promise not to recommend a sentence. *Id.* His request was denied and he appealed to the Third Circuit. *Id.*

The Third Circuit addressed Cimmino's argument that he had misunderstood the plea agreement. *Id.* at 24. Cimmino believed that the maximum sentence he could receive was seven years, meaning a maximum time of confinement of four years and three years of special parole. *Id.* The government argued that the maximum sentence was seven years of confinement plus three years of special parole. *Id.* Considering that the government and the district judge had not made the distinction between sentence and confinement, the Third Circuit held that Cimmino's misunderstanding was reasonable. *Id.* The Third Circuit further held that as a result of this misunderstanding, Cimmino had not entered his plea knowingly and voluntarily. *Id.* at 24-25; see also *Mosher v. Lavallee*, 491 F.2d 1346, 1348 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974). In addition, the existing Rule 11 of the Federal Rules of Criminal Procedure required that defendants be informed of the "consequences of the plea" for the plea to be valid. *Crusco*, 536 F.2d at 25; see FED. R. CRIM. P. 11. The Third Circuit concluded that Cimmino had not been "unambiguously informed of the maximum punishment he faced." *Crusco*, 536 F.2d at 25; see also *United States v. Hawthorne*, 532 F.2d 318 (3d Cir. 1976); *United States v. Maggio*, 514 F.2d 80 (5th Cir. 1975); *Berry v. United States*, 412 F.2d 189 (3d Cir. 1969). The Third Circuit, therefore, permitted Cimmino to withdraw his guilty plea and to plead again. *Crusco*, 536 F.2d at 25.

65. *Crusco*, 536 F.2d at 25. Cimmino's objection to the government conduct was his second argument on appeal. *Id.* For a discussion of his first argument regarding his misunderstanding of his maximum possible sentence, see *supra* note 64.

66. *Crusco*, 536 F.2d at 25.

67. *Id.* The government made this statement after having promised to refrain from taking a position on sentencing. *Id.*

68. *Id.* The government sought to show Cimmino's danger to the community by explaining that he had been arrested and indicted on another conspiracy count while out on bail in the present case. *Id.*

69. *Id.* The government argued its right to rebut defense counsel's factual

of these arguments.⁷⁰ First, the *Crusco* court rejected the argument that the government was simply fulfilling its obligation to rebut defense counsel's factual misrepresentations.⁷¹ The court interpreted defense counsel's statement as nothing more than "a paradigmatic argument for leniency in sentence."⁷²

Second, the *Crusco* court dismissed the argument that the government's brief remarks regarding Cimmino's character should be excused because the judge made the actual sentencing decision.⁷³ In dismissing the government's second argument, the Third Circuit, in *Crusco*, relied on the Supreme Court's ruling in *Santobello* that a prosecutor's promise had to be fulfilled regardless of whether a breach of that promise constituted harmless error.⁷⁴ Thus, the government violated its promise not to recommend a sentence by portraying Cimmino as a major figure in organized crime and a danger to the community.⁷⁵ The *Crusco* court stated that the government's characterization of Cimmino was "a transparent effort to influence the severity of [his] sentence."⁷⁶

Finally, the *Crusco* court refuted the government's contention that its agreement with Cimmino required the government to abstain from recommending the terms of Cimmino's sentence.⁷⁷ The court concluded that this argument required too strict and narrow an interpreta-

misrepresentations, the lack of effect of the government's remarks on the sentencing judge and the narrow construction of the promise not to recommend a specific sentence. *Id.*

70. *Id.* at 25-26.

71. *Id.* The government was referring to defense counsel's portrayal of Cimmino as a family man, with integrity and honor, who was not a heavyweight drug dealer as the government had depicted him. *Id.* at 25.

72. *Id.* The Third Circuit noted that if defense counsel was embellishing the facts, the government had foreclosed any response by its unqualified promise not to take a position on sentencing. *Id.* at 25-26. In addition, the Third Circuit noted that the district court had access to all of the information in the case and was able to form its own opinion concerning Cimmino's character, without the assistance of the government. *Id.* at 26.

73. *Id.* The *Crusco* court labelled the government's statement that it was fulfilling its part of the plea agreement and leaving the sentencing to the judge as "self-serving." *Id.* The government's remarks at sentencing were not justified even if such remarks did not affect the sentencing judge. *Id.*

74. *Id.* (citing *Santobello v. New York*, 404 U.S. 257, 262 (1971)). The Third Circuit noted that the Supreme Court in *Santobello* had not been "swayed by the district judge's assurance that he was not influenced in his sentencing by the prosecutor's recommendation." *Id.* (citing *Santobello*, 404 U.S. at 262).

75. *Id.* The Third Circuit stated that although the facts in *Santobello* were more blatant, the government in *Crusco* had promised to take no position on sentencing, and yet the government portrayed Cimmino in such a negative manner that it in effect took a position and tried to influence his sentencing. *Id.*

76. *Id.* The court explained its view that "[o]nly a stubbornly literal mind" would fail to interpret the government's language as taking a position on sentencing. *Id.*

77. *Id.*

tion of the plea agreement between the parties.⁷⁸

b. *United States v. Miller*

The *Hayes* court also discussed its decision in *United States v. Miller*.⁷⁹ In *Miller*, the defendant, Ronald Miller, entered a guilty plea in exchange for the government's promise not to make a recommendation at sentencing.⁸⁰ The government, however, retained the right to inform the district court about Miller's cooperation.⁸¹

Miller alleged that the government violated the plea agreement in responding to defense counsel's request for leniency in sentencing.⁸² Miller contended that the police had induced him to commit illegal activity.⁸³ The defendant also contended that he had cooperated with law enforcement officials.⁸⁴ The government responded to Miller's contentions that a year and a half had elapsed between the alleged inducement and the commission of the crime, and that Miller had not cooperated at all.⁸⁵

Miller asserted that these remarks violated the government's promise not to recommend a sentence.⁸⁶ In his assertion, Miller relied on the Third Circuit's earlier holding in *Crusco*.⁸⁷ In response to Miller's assertion, the *Miller* court reaffirmed the holding in *Crusco* that the government must adhere strictly to the terms of its bargain.⁸⁸ The *Miller* court,

78. *Id.* The court rejected the government's justification for a strict interpretation of the plea agreement as untenable. *Id.* The court stressed:

An unqualified promise of the prosecution not to take a position on sentencing obviously jeopardizes the Government's position in the sentencing process and may require the Government to remain silent when it should stand up and speak. The Government, therefore, must also clearly understand the scope and depth of its commitment and the need for precision in plea bargaining. It may reach port in the plea bargaining process but founder there because of careless or loose language in its commitment. Once it makes a promise, *Santobello* requires strict adherence.

Id.

79. 565 F.2d 1273 (3d Cir. 1977), *cert. denied*, 436 U.S. 959 (1978). In *Miller*, the defendant, Ronald Miller, was charged in a two count indictment involving unlawful possession of heroin with intent to distribute. *Id.* at 1273.

80. *Id.*

81. *Id.*

82. *Id.* at 1274.

83. *Id.*

84. *Id.*

85. *Id.* The government responded to defendant's attempted "excuse defense" by questioning: "How does it make it excusable? Did he hold a gun to his head for a year and a half? How does that make it excusable?" *Id.* at 1274 & n.1. The government also argued that to call Miller's actions "cooperation" was a travesty. *Id.* at 1274 n.2.

86. *Id.* at 1274.

87. *Id.* Miller also cited the Supreme Court's holding in *Santobello* as controlling. *Id.*

88. *Id.*

however, distinguished the language of the plea agreement in the case before it from that used in *Crusco*.⁸⁹

In the plea agreement at issue in *Crusco*, the government promised “not to take a position;” in the *Miller* case, on the other hand, the government promised “not to make a recommendation.”⁹⁰ Thus, the government’s promise in *Crusco* not to take a position was a “broad, unqualified promise” that deprived the government of the right to comment on the seriousness of the sentence or on whether the defendant should be imprisoned.⁹¹ The agreement in *Miller* not to make a recommendation coupled with a reserved right to comment on cooperation was a narrower promise.⁹²

In *Miller*, the government labelled Miller’s lack of cooperation a travesty, which the Third Circuit characterized as a fair rebuttal comment regarding the defendant’s actions.⁹³ The court stated that the government’s remarks that Miller’s actions were inexcusable did not violate the plea agreement.⁹⁴ The court concluded that this statement was beyond the scope of the government’s promise not to make a recommendation regarding the sentence.⁹⁵ The court, however, admonished the government that plea bargaining may involve inherent semantic pitfalls.⁹⁶ This warning reiterated the Third Circuit’s statement in *Crusco* that a plea bargain may falter due to careless or loose language in the

89. *Id.* at 1274. The Third Circuit also stated that Miller was distinguishable from *Santobello*. *Id.*

90. *Id.* at 1275. In *Crusco*, the government attempted to equate its promise “not to take a position” with “not making a recommendation,” but this argument was rejected by the Third Circuit. *United States v. Crusco*, 536 F.2d 21, 25-26 (3d Cir. 1976). In *Miller*, the Third Circuit recognized that the government “ha[d] only promised to make no recommendation as to sentence and ha[d] expressly reserved the right to comment on defendant’s cooperation.” *Miller*, 565 F.2d at 1275.

91. *Miller*, 565 F.2d at 1275.

92. *Id.* The *Miller* court compared the two promises in *Crusco* and the case at bar: “The difference between the two terms is elementary, for the promise not to recommend is narrow, speaking only as to the sentence to be imposed, whereas a promise to take no position speaks to no attempt at all to influence the defendant’s sentence.” *Id.*

93. *Id.* The Third Circuit held that such remarks did not violate the government’s promise because the government had expressly reserved the right to comment on Miller’s cooperation. *Id.*

94. *Id.*

95. *Id.* The *Miller* court appeared concerned with the prosecutor’s remarks about the alleged coercion of Miller because such remarks did not fall within the right to comment on Miller’s cooperation. *Id.* Nevertheless, the court accepted the remarks as a rhetorical response to Miller’s attempted excuse defense, which the court held was not prohibited by the government’s narrow promise “not to make a recommendation.” *Id.*

96. *Id.* The court reminded the government that once promises were made, they had to be fulfilled in the interest of justice and fairness to the accused and to the public. *Id.*

government's commitment.⁹⁷ Furthermore, the Supreme Court in *Santobello* held that even an inadvertent breach of a plea agreement required a remand of the case, because this remand would appropriately recognize the duties of the prosecution in relation to the promises made in plea bargaining.⁹⁸

c. *United States v. Moscahlaidis*

The Third Circuit in *Hayes* also discussed *United States v. Moscahlaidis*.⁹⁹ In *Moscahlaidis*, the government promised in the plea agreement "not [to] take a position relative to whether or not a custodial sentence shall be imposed" while reserving the right to inform the sentencing judge of the activities of the defendant, John Moscahlaidis.¹⁰⁰ Notwithstanding its agreement, the government described Moscahlaidis negatively and portrayed him as a greedy and immoral criminal.¹⁰¹ The Third Circuit held that based on its conduct, the government violated the plea agreement.¹⁰² In support of its holding, the *Moscahlaidis* court stated that the language in the agreement that the government would take no position at sentencing required strict adherence.¹⁰³

d. *United States v. Brummett* Distinguished

Having stated that *Hayes* was factually distinguishable from previous decisions,¹⁰⁴ the Third Circuit also distinguished *Hayes* from a factually similar Sixth Circuit decision, *United States v. Brummett*.¹⁰⁵ In *Brummett*,

97. *Crusco*, 536 F.2d at 26. The *Crusco* court emphasized the importance of precision in plea bargaining as well as the need for the government to understand the scope and depth of its commitment. *Id.*

98. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

99. *Hayes*, 946 F.2d at 234 (citing *United States v. Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989)).

100. *Moscahlaidis*, 868 F.2d at 1358-59.

101. *Id.* at 1359.

102. *Id.*

103. *Id.* at 1363.

104. *United States v. Hayes*, 946 F.2d 230, 235 (3d Cir. 1991).

105. 786 F.2d 720 (6th Cir. 1986). The Third Circuit in *Hayes* mentioned that there were no cases that ever before addressed its issue and in the same particular context. *Hayes*, 946 F.2d at 235 n.5. The *Hayes* court noted, however, that the *Brummett* case was the most similar to the facts of *Hayes*. *Id.* In *Brummett*, the defendant Eddie Wayne Brummett, a dispatcher for a fire department, was charged with aiding and abetting his co-defendants in a beating and sexual assault. *Brummett*, 786 F.2d at 721. Brummett pled guilty to the charges in exchange for promises made by the government in a plea agreement. *Id.* at 722. For a list of the government's promises, see *infra* note 106.

Brummett sought to reduce his sentence arguing that his due process rights were violated and that the government breached the plea agreement. *Brummett*, 786 F.2d at 721-22. The alleged due process violation occurred because the district court appeared to hold Brummett to the duty of trust of a police officer although he was simply an off-duty dispatcher. *Id.* The Sixth Circuit rejected Brummett's claim and ruled that the district court had simply held Brummett to

the government promised, *inter alia*, to refrain from recommending “a specific period of incarceration or a specific fine” for the defendant Eddie Wayne Brummett’s offenses during sentencing.¹⁰⁶ In exchange for these promises, Brummett promised to enter a guilty plea and to cooperate with the government.¹⁰⁷ The government retained the right to inform the court of the seriousness of Brummett’s offenses and of the necessity to incarcerate Brummett for some period for each offense.¹⁰⁸

In appealing the sentencing decision, Brummett alleged that the government violated its plea agreement by responding to the court’s question regarding sentence recommendations.¹⁰⁹ The government described defense counsel’s request for a six month prison term as too lenient and submitted to the court that a lengthy period of incarceration would act as a more appropriate deterrent.¹¹⁰ The government stated, however, that it would abide by its plea agreement not to make a specific sentencing recommendation.¹¹¹

The Sixth Circuit concluded in *Brummett* that the government had not breached its agreement, although the government’s recommendation for a “‘lengthy’” period of incarceration clouded “‘an otherwise clear picture.’”¹¹² The court emphasized that Brummett had received

a standard of trust imposed upon him by virtue of his position at the police department. *Id.* at 722. The district court interpreted Brummett’s possession of the keys to the jail, his presence at the jail and his operation of the jail radio as indications that he had been acting in an official capacity when he committed the offense. *Id.* at 721.

106. *Brummett*, 786 F.2d at 722. The government in *Brummett* had made four promises in return for the defendant’s plea of guilty and promise to cooperate. *Id.* In addition to the promise not to recommend a specific sentence or fine, the government promised: “(1) to dismiss other charges; (2) to recommend concurrent sentences; (3) to recommend that if Brummett were sentenced to a prison term exceeding one year, that the court specify he may be paroled under 18 U.S.C. § 4205(b)(2).” *Id.* Brummett alleged that the government breached the agreement by breaking the promise not to recommend a specific sentence or fine. *Id.* The government had, however, retained the right to inform the court that some period of incarceration was appropriate. *Id.*

The Third Circuit in *Hayes* focused on the government’s retention of the right to comment on some period of incarceration in *Brummett* to distinguish the two cases. *Hayes*, 946 F.2d at 235 n.5. The government in *Hayes* did not retain a similar right. *Id.*

107. *Brummett*, 786 F.2d at 722.

108. *Id.*

109. *Id.*

110. *Id.* at 722-23. Brummett’s defense counsel had argued that Brummett should receive a six month term of imprisonment, with the remaining time being served on probation. *Id.* at 722. The government allegedly breached the plea agreement by advocating a “lengthy period of incarceration” rather than simply recommending “some period of incarceration.” *Id.* at 723.

111. *Id.*

112. *Id.* (quoting *United States v. Bulloch*, 725 F.2d 118, 119 (D.C. Cir. 1984)). The Sixth Circuit stated that although plea agreements are to be construed strictly, the plea agreement had not been breached in Brummett’s case. *Id.*

the “ ‘benefit of his bargain,’ ”¹¹³ yet the court admonished the government to avoid conduct that may raise questions about the government’s adherence to the terms of a plea bargain.¹¹⁴

In *Hayes*, the Third Circuit distinguished its case from the Sixth Circuit’s holding in *Brummett* by referring to a clause in the *Brummett* plea agreement that permitted the government to comment to the court that some period of incarceration would be appropriate.¹¹⁵ No such clause existed in the *Hayes* plea agreement.¹¹⁶ Furthermore, the *Hayes* court stated that defense counsel in *Brummett* had anticipated some period of incarceration because counsel had advocated a sentence of six months, whereas defense counsel in *Hayes* had sought probation as an alternative to imprisonment.¹¹⁷

3. *The Reasoning in Hayes*

After dismissing the *Brummett* decision, the Third Circuit categorized *Hayes* as falling between *Miller* and *Santobello*.¹¹⁸ The Third Circuit interpreted the language of *Hayes*’ plea agreement requiring that the government “make no recommendation as to the specific sentence” differently from how such language was interpreted in both *Miller* and *Santobello*.¹¹⁹ The Third Circuit in *Miller* held that the government’s statements were consistent with the plea agreement, while the Supreme Court in *Santobello* held that the prosecutor’s statement violated the plea agreement.¹²⁰

In *Hayes*, the government promised “to make no recommendation as to the specific sentence” but then expressly advocated in its Sentencing Memorandum a sentence within the range of the Sentencing Guidelines for Count One.¹²¹ The Third Circuit held that the identification by the government of a specific range of sentence instead of other alternatives such as probation or a fine, clashed with the plain language of the plea agreement and with *Hayes*’ request for probation.¹²²

113. *Id.* (quoting *Bercheny v. Johnson*, 633 F.2d 473, 476 (6th Cir. 1980)).

114. *Id.* (citing *Bulloch*, 725 F.2d at 119).

115. *United States v. Hayes*, 946 F.2d 230, 235 n.5 (3d Cir. 1991). For a description of the clause in the plea agreement in *Brummett*, see *supra* text accompanying note 108.

116. *Hayes*, 946 F.2d at 235 n.5.

117. *Id.*

118. *Id.* at 235.

119. *Id.*

120. *Id.* The Third Circuit in *Hayes* stated that in *Miller*, the government’s “mere rebuttal of defense counsel’s exculpatory statements was found not to offend the ‘make no recommendation’ provision.” *Id.* The *Hayes* court also stated that in *Santobello*, “the prosecutor’s explicit endorsement of imposing the maximum term did violate the ‘make no recommendation’ commitment.” *Id.*

121. *Id.* Count One was the only count subject to the Sentencing Guidelines. *Id.* at 232 n.1. For a description of the purposes behind the promulgation of the Sentencing Guidelines, see *supra* note 26.

122. *Hayes*, 946 F.2d at 235. The *Hayes* court stated that the government

To reach its decision, the Third Circuit measured the prejudice caused by the government's recommendations by examining the lower range of sentences potentially available to the defendant under Count One.¹²³ Hayes argued that he was eligible for a "downward departure" from the range set forth in the Sentencing Guidelines due to diminished capacity.¹²⁴ This departure would have qualified him for probation as an alternative to imprisonment.¹²⁵

The government argued that its recommendation constituted harmless error.¹²⁶ Because the Sentencing Guidelines restricted the judge's discretion, the government's recommendation did not influence the judge's sentencing decision.¹²⁷ This assertion was based on the premise that in seeking a sentence within the range of the Sentencing Guidelines, the government was not recommending a specific sentence because the judge could not depart from the range and order probation for Hayes without a valid reason for the downward departure.¹²⁸ The Third Circuit held that this argument had no merit because the defendant already had shown evidence of a colorable claim for a downward departure.¹²⁹ The *Hayes* court also reiterated the Supreme Court's holding in *Santobello* that the absence of influence on the sentencing judge was irrel-

had specifically identified a period of 57 to 60 months of incarceration, while excluding the options for a shorter period of imprisonment, probation, or a fine. *Id.*

123. *Id.* (stating that prejudice caused to defendant became "even more striking" when alternative ranges of sentences were examined).

124. *Id.* Hayes had actively sought a departure from the Sentencing Guidelines range predicated on a diminished capacity defense. *Id.* He had calculated his offense level to be four or six, placing him within a Sentencing Guidelines range of zero to six months. *Id.* at 235 n.6. Hayes' attorney argued at the sentencing hearing that the purported mitigating factors of a diminished capacity ought to be considered in granting Hayes' request for probation. *Id.* at 235.

According to the Sentencing Guidelines, a "downward departure" from the prescribed range for an offense level and offender category is available when "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988); UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (rev. ed. 1988), ch. 1, pt. A(4)(b) (policy statement).

125. *Hayes*, 946 F.2d at 235 & n.6. The district court, however, sentenced Hayes to a term of 54 months on Count One alone. *Id.* at 235. Although the district court did not accept Hayes' recommendation, it did reduce the guideline range suggested by the government from 57-60 months to a range of 51-60 months. *Id.* at 235-36. This was largely due to the fact that the probation officer had responded to Hayes' objections to his Presentence Report by admitting that a mistake had been made in calculating Hayes' total offense level. *Id.*

126. *Id.* at 236.

127. *Id.*

128. *Id.* For a discussion of the concept of a "downward departure," see *supra* note 124.

129. *Hayes*, 946 F.2d at 236. Hayes had presented expert opinion evidence in seeking a downward departure due to diminished capacity. *Id.* at 235.

evant to determine whether the government had breached its promise.¹³⁰

The *Hayes* court dismissed the government's argument that attempted to narrow the interpretation of the plea agreement.¹³¹ The court declined to interpret the government's promise to "make no recommendation as to the specific sentence" as "an agreement not to recommend a specific term of incarceration within the guideline range."¹³² The *Hayes* court concluded that the government's recommendation of the range of 57 to 60 months of imprisonment clashed with the terms of the plea agreement.¹³³

4. *Hayes*' Remedy

In holding that the government had breached its promise not to make a recommendation at sentencing, the *Hayes* court discussed the remedy available to Hayes.¹³⁴ The court concluded that because the government had violated the plea agreement, Hayes' sentence must be vacated and the case remanded.¹³⁵ The *Hayes* court, relying on *Moscahlaidis*, directed the district court, on remand, to determine if the appropriate remedy would entail specific performance of the plea agreement or withdrawal of the plea.¹³⁶ Essentially, the district court was asked to exercise its discretion to determine the appropriate choice between enforcing specific performance through resentencing and withdrawing the guilty plea.¹³⁷

III. CONCLUSION

The Third Circuit analyzed *Hayes* consistently with prior decisions that analyzed the different aspects of a plea agreement. In holding that the government had violated its plea agreement, the Third Circuit in *Hayes* established a novel definition of government misconduct. Both prosecutors and defense counsel must be aware that language promising

130. *Id.* at 236. The Supreme Court in *Santobello* found that a sentencing judge's claim that a prosecutor's comments did not influence him was irrelevant in determining the government's adherence to a plea agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971). For a discussion of *Santobello v. New York*, see *supra* notes 44, 49-52 and accompanying text.

131. *Hayes*, 946 F.2d at 236.

132. *Id.* (stating that "[i]f such a limited occasion were intended, it should have been clearly stated in the agreement").

133. *Id.* at 235.

134. *Id.* at 236.

135. *Id.*

136. *Id.* (citing *United States v. Moscahlaidis*, 868 F.2d 1357, 1357 (3d Cir. 1989) (citation omitted) and *United States v. American Bag & Paper Corp.*, 609 F.2d 1066 (3d Cir. 1979)).

137. *Id.* The Supreme Court addressed this proposition in *Santobello*. See *Santobello v. New York*, 404 U.S. 257, 263 (1971). For a discussion of *Santobello*, see *supra* notes 44, 49-52 and accompanying text.

“not to make a recommendation” is interpreted more narrowly than language promising “not to take a position.”¹³⁸

The government’s promise in the plea agreement “not to make a recommendation as to the specific sentence” prevents the government from advocating a specific range of incarceration, to the exclusion of a shorter term of incarceration or alternative means of punishment.¹³⁹ The promise “not to make a recommendation” may, however, permit indirect or rebuttal comments that may affect sentencing.¹⁴⁰ In distinguishing *Hayes* from the Sixth Circuit’s decision in *Brummett*, the Third Circuit illustrated the trend toward construing plea agreements narrowly. The Third Circuit distinguished the two cases solely on the basis of a clause in *Brummett*’s plea agreement that permitted the government to comment to the court that some period of incarceration was appropriate.¹⁴¹

In contrast, the *Hayes* court reiterated that a promise by the government “not to take a position” is a broad, unqualified promise not to comment on sentencing, either directly or indirectly.¹⁴² Thus, after *Hayes*, even if the government in a plea agreement retains the right to comment on the defendant’s activities to the court, the scope of these comments is strictly limited.¹⁴³

Finally, *Hayes* dictates that if a reviewing court finds that the government has breached a plea agreement, that court must remand the case to the lower court for a determination of the defendant’s available relief.¹⁴⁴ The defendant will either be resentenced before a different judge, or the guilty plea will be withdrawn.¹⁴⁵

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138. See *Hayes*, 946 F.2d at 234. For a discussion of the Third Circuit’s differing interpretations of governmental promises in the plea agreements in *Crusco* and *Miller*, see *supra* notes 89-92 and accompanying text.

139. *Hayes*, 946 F.2d at 235.

140. *Id.* For a discussion of the *Miller* court’s interpretation of the government promise “to make no recommendation” as to the sentence, see *supra* notes 89-92 and accompanying text.

141. *Hayes*, 946 F.2d at 235 n.5. For a discussion of the Sixth Circuit’s opinion in *Brummett*, see *supra* notes 104-14 and accompanying text.

142. *Hayes*, 946 F.2d at 234; see also *Miller*, 565 F.2d at 1275; *Crusco*, 536 F.2d at 26.

143. *Hayes*, 946 F.2d at 234. For a discussion of this proposition in the Third Circuit’s *Miller* opinion, see *supra* notes 92-97 and accompanying text.

144. *Hayes*, 946 F.2d at 236. For a discussion of the Supreme Court’s holding in *Santobello* in which the Court addressed this point, see *supra* note 44.

145. *Hayes*, 946 F.2d at 236; *Santobello v. New York*, 404 U.S. 257, 263 (1971).